No. 82-1705

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NEW YORK UNIVERSITY MEDICAL CENTER, ET AL.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether there remains any issue in this case which should be considered by the National Labor Relations Board and the Court of Appeals below prior to consideration by this Court.

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STATEMENT

Respondent New York University Medical Center provides health care services in New York, New York (App. C, 33a).*

On September 21, 24 and 25, 1979, employee Benin and, on one occasion, employee Vargas distributed leaflets to employees. One of the leaflets they distributed contained accusations that the respondent used its security guards as a "fascist gestapo" to conduct searchs of workers (App. A, 3a-4a; App. C, 34a-35a). On September 28, 1979, respondent issued written disciplinary warnings to Benin and Vargas for their distribution of the leaflets.

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* Citations to appendices refer to the appendices contained in the Board's petition.

In early October, Benin, Vargas and employee Laszlo Berkovits took part in the preparation and distribution of another leaflet, which renewed the allegation that "the N.Y.U. management is using the security guards for fascist gestapo tactics" (App. C, 35a). On October 5, 1979, Benin was notified by respondent that he was being suspended from work without pay because of his participation in the distribution of this leaflet (id. at 35a).

On October 8, 1979, Benin, Vargas and several other individuals picketed the home of respondent's assistant administrator Safian to protest Benin's suspension (App. C, 35a). At least one of the picketers intruded upon the administrator's property, leaving two signs in the mailbox. One read, "Safian, You Fascist We'll Burn You into Ashes." The other read "Safian Uses Fascist Tactics Against Workers" (App. A, 5a). On October 11, 1979, respondent discharged Benin and suspended Vargas "for threatening a Medical Center Administrator and his family and engaging in intimidating behavior outside his house on October 8, 1979" (App. A, 5a). Respondent also issued a written warning to employee Berkovits on October 11, 1979 for his involvement in the distribution of the most recent leaflet (App. C, 36a). The Board's General Counsel subsequently filed a complaint alleging that respondent's disciplinary measures violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1).

The administrative law judge ("ALJ") found that respondent had violated Section 8(a)(1) of the Act by issuing disciplinary

warnings to Benin, Vargas and Berkovits, by suspending Benin and Vargas, and by discharging Benin, because they engaged in the protected activity of distributing leaflets concerning an intra-union election campaign (App. C, 32a-44a). The ALJ recommended that Benin be reinstated with back pay, that Benin and Vargas be reimbursed for wages lost during their periods of suspension, and that the disciplinary warnings issued to Benin, Vargas and Berkovits be expunged from respondent's personnel files (id at 40a-44a).

In reaching his conclusion that the discharge of Benin and suspension of Vargas were unlawful, the ALJ expressly relied (App. C, 38a-39a) on the Board's decision in Wright Line, a Division of Wright Lines, Inc., 251 N.L.R.B. 1083 (1980), enforced 692 F.2d 899 (CA1 1981), cert. denied, 455 U.S. 989 (1982). In Wright Line the Board explained that, in determining whether an employer's action violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), it would first require the General Counsel to show that the employee's protected activities were a "motivating factor" in the employer's decision to take adverse action against the employee. If the General Counsel made this showing, the Board ruled that the employer could avoid an unfair labor practice finding if it proved, by a preponderance of the evidence, that it would have taken the adverse action even if the employee had not engaged in protected activities. 251 NLRB at 1089.

The ALJ found that the General Counsel had sustained his burden of establishing that the employees' protected leafleting

activity was a motivating factor in the discharge of Benin and the suspension of Vargas (App. C, 38a). The ALJ further found that respondent had failed to rebut the General Counsel's showing by establishing that it would have discharged Benin and suspended Vargas if they had engaged only in picketing activity (id. at 39a). The ALJ found it unnecessary to reach the issue of whether the employees' picketing activity was protected under the Act (id. at 38a).

The Board affirmed the decision of the ALJ and adopted his recommended order (App. C, 28a-31a).

The Second Circuit sustained the Board's findings that the employees' leafleting activity was protected by Section 7 of the Act, 29 U.S.C. 157, and that respondent's suspension of Benin and issuance of warning letters to Benin, Vargas and Berkovits for the distribution of the leaflets violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1) (App. A, 1a-26a). However, the court remanded the case to the Board for reconsideration of the conclusion that respondent's discharge of Benin and suspension of Vargas violated Section 8(a)(1) of the Act (App. A, 13a-26a).

While the Second Circuit remanded the case to the Board because it disagreed with the Board's Wright Line allocation of the burden of proof, it did not find that the Board's decision (that Benin would not have been discharged and Vargas would not have been suspended except for their protected activity in distributi

leaflets) was supported by substantial evidence on the record considered as a whole. To the contrary, it stated that the Board's decision on this point "flies in the face of common sense" (App. A, 24a).

The court noted that the discharge and suspension came only after the picketing incident (not alleged to be protected activity by the General Counsel) and stated that the General Counsel's evidence did not "suggest that the Center would have disciplined the employees a second time entirely because of conduct for which they had already been disciplined" (App. A, 24a, 25a).

Finally, and most clearly, the Second Circuit stated in footnote 14:

> "It seems evident that the Center would have disciplined the employees to some extent for taking part in the picketing, regardless of the previous leafleting" (App. A, 25a).

REASONS FOR DENYING THE PETITION

In National Labor Relations Board v. Transportation Management Corp., _____ U.S. _____, (No. 82-168 decided June 15, 1983), the Court upheld the Board's Wright Line* allocation of the burden of proof in dual-motive cases, and then found that the Board's

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* Wright Line, 251 NLRB 1083 (1980), enforced, 662 F.2d 899 (CA1 1981), cert. denied 455 U.S. 989 (1982).

decision (that the employee involved would not have been discharged in the absence of his union activity) was supported by substantial evidence on the record considered as a whole.

The Second Circuit remanded the instant case because it disagreed with the Board's Wright Line allocation of the burden of proof. In view of the Supreme Court's ruling in Transportation Management, supra, the Board may use the Wright Line allocation and that is no longer an issue in this case. The Second Circuit, however, did not rule on the issue of whether the Board's decision concerning Benin's discharge and Vargas' suspension was supported by substantial evidence on the record considered as a whole. Instead it indicated clearly that it did not believe that it was. It stated that the Board's decision "flies in the face of common sense" (App. A, 24a). It rejected the Board's reasoning that the Medical Center took the opportunity of the subsequent unprotected picketing to discipline Benin and Vargas a second time for their protected activity in distributing leaflets (App. A, 24a, 25a). It concluded that "the Center would have disciplined the employees to some extent for taking part in the picketing, regardless of the previous leafleting" (App. A, 25a).

If the petition is denied, this case would be remanded to the Board for further proceedings. In view of the Court's decision in Transportation Management, supra, the Board would not need to change its allocation of the burden of proof. It might decide, however, to accept the Second Circuit's opinion on the unpersuasive

nature of the evidence supporting its decision. In this respect, it should be noted that the Board used its short form opinion in this case, adopting the findings and conclusions of the Administrative Law Judge, and did not give the appellate court the benefit of its reasoning (App. C, 28a, 29a). If the Board reissues its order and seeks enforcement, the Court of Appeals will then have the opportunity to consider whether the decision is supported by substantial evidence on the record considered as a whole. This would be the most orderly and appropriate way for the case to be handled. If this procedure is followed, this Court need not and should not consider this case at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 13, 1983